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LETTER DATED 5 APRIL 1993 FROM THE PERMANENT REPRESENTATIVE OF THE RUSSIAN FEDERATION TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

I have the honour to transmit to you, pursuant to paragraph 2 of Security Council resolution 808 (1993), a draft statute of the international tribunal to hear cases relating to crimes committed in the territory of the former Yugoslavia, with the relevant explanatory notes.

I should be grateful if you would have the text of this letter and the draft statute, together with the explanations, distributed as a document of the Security Council.

(Signed) Y. VORONTSOV

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Annex I

Statute of the International Tribunal to hear cases relating to crimes committed in the territory of the former Yugoslavia

Article 1. Establishment of the Tribunal

An International Tribunal (hereinafter called "the Tribunal") is hereby established to hear cases relating to crimes falling within its jurisdiction under this Statute committed in the territory of the former Yugoslavia.

Article 2. Organs of the Tribunal

The organs of the Tribunal shall be:

(a) The Judicial Branch of the Tribunal (hereinafter called "the Judicial Branch"), composed of:

- The Court of First Instance;
- The Appellate Court;
- The Plenum of the Judicial Branch;

(b) The Bureau of the Tribunal for investigation and prosecution (hereinafter called "the Bureau");

(c) The Registry of the Tribunal (hereinafter called "the Registry");

[(d) The Special Committee on crimes in the former Yugoslavia (hereinafter called "the Committee")].

Article 3. The Court of First Instance

1. The Court of First Instance shall be composed of 15 judges elected by the Committee from among candidates nominated by States participating in the Conference on Security and Cooperation in Europe (CSCE). Each State shall nominate one candidate.

[1. The Court of First Instance shall be composed of 15 judges elected according to the procedure established for the election of members of the International Court of Justice [, mutatis mutandis].]

2. To try each case in the Court of First Instance, a chamber composed of three judges shall be established.

Article 4. The Appellate Court

1. The Appellate Court shall be composed of nine judges elected from among candidates nominated by States represented in the Committee. Each State shall nominate one candidate.

2. To try each case in the Appellate Court, a chamber composed of three judges shall be established.

Article 5. Judges

Judges shall be elected from among persons of high moral character, who possess the qualifications required in their country of nationality for appointment to the highest judicial offices. No two members of the Judicial Court may be nationals of the same State.

Article 6. Plenum of the Judicial Branch

1. The Plenum of the Judicial Branch shall be composed of the judges of the Court of First Instance and the judges of the Appellate Court.

2. The Plenum of the Judicial Branch shall elect a President from among the judges of the Appellate Court and a Vice-President from among the judges of the Court of First Instance.

Article 7. Rules of the Tribunal

1. The Plenum of the Judicial Branch shall adopt the Rules of the Tribunal, subject to approval by the Committee.

2. The Rules of the Tribunal shall contain, inter alia, the rules of procedure of the Court of First Instance, the Appellate Court, the Plenum of the Judicial Branch and the Bureau.

Article 8. Procedure for the adoption of decisions in the Judicial Branch

1. Decisions of the Plenum of the Judicial Branch shall be adopted by a majority of votes of the total number of judges.

In the event of an equality of votes, the President shall have a casting vote.

2. Decisions of the Court of First Instance and of the Appellate Court in chambers shall be adopted by a majority of votes of the members, who may not abstain in the vote.

Article 9. The Bureau

1. The Bureau shall be composed of 35 members elected by the Committee from among candidates nominated by States represented in the Committee. Each State shall nominate two candidates.

2. The requirements specified in article 5 of this Statute shall apply to members of the Bureau.

3. The Committee shall appoint from among the members of the Bureau a Chief Prosecutor and a Deputy Prosecutor, who shall not be nationals of the same State.

4. The members of the Bureau shall not include more than two nationals of the same State.

Article 10. The Registry

1. The Registry shall perform administrative, technical and organizational duties to ensure the smooth functioning of the Tribunal.

2. The Committee shall appoint a Registrar of the Tribunal to head the Registry of the Tribunal.

3. The Registrar of the Tribunal shall recruit and appoint the staff required for the performance of the Registry's functions.

Article 11. The Committee

1. The Committee shall be composed of representatives of the founding States of the Tribunal and representatives of States which have applied to participate in the Tribunal in accordance with the procedure provided for in article 35 of this Statute.

2. The founding States of the Tribunal shall be the States members of the Security Council and the States formed on the territory of the former Yugoslavia.

3. Each of the States referred to in paragraph 1 shall appoint a representative to the Committee.

4. The Committee shall elect a President and a Vice-President.

5. In addition to the functions specified in other articles of this Statute, the Committee shall adopt the budget of the Tribunal and the Financial Regulations of the Tribunal and shall establish the Staff Regulations for the staff of the Registry.

6. The Committee shall adopt its own rules of procedure.

7. With the exception of decisions relating to the election of judges and members of the Bureau, the decisions of the Committee shall be adopted by consensus. If a consensus cannot be achieved, the President shall suspend the meeting for 24 hours for consultations. If at the end of 24 hours a consensus has not been achieved, a decision shall be taken by a two-thirds majority of the representatives of States present and voting, including the concurring votes of representatives of all the permanent members of the Security Council.

8. A quorum of the Committee shall consist of two thirds of the representatives of the founding States of the Tribunal and of States which have applied to participate in the Tribunal in accordance with the procedure provided for in article 35 of this Statute.

Article 12. Crimes within the jurisdiction of the Tribunal

1. The following crimes shall be within the jurisdiction of the Tribunal:

(a) Military crimes such as serious violations of the Geneva Conventions for the protection of war victims of 12 August 1949 or the Protocols Additional thereto of 8 June 1977, or legislation which is not contrary to international law and which, at the time the crime was committed, was in force in the State formed on the territory of the former Yugoslavia in which the crime was committed, and any other military crime characterized as such under the generally recognized rules of international law;

(b) The crime of genocide, as defined in the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 or in legislation which is not contrary to international law and which, at the time the crime was committed, was in force in the State formed on the territory of the former Yugoslavia in which the crime was committed;

(c) Crimes against mankind, as defined under the generally recognized rules of international law and as reflected, in particular, in the Charter of the International Military Tribunal and the relevant resolutions of the General Assembly of the United Nations or in legislation which is not contrary to international law and which, at the time the crime was committed, was in force in the State formed on the territory of the former Yugoslavia in which the crime was committed;

(d) Acts of torture, as defined in the relevant provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 or in legislation which is not contrary to international law and which, at the time the crime was committed, was in force in the State formed on the territory of the former Yugoslavia in which the crime was committed.

2. The fact that an act or omission is or is not punishable under internal law does not affect the characterization of the act or omission as a crime falling within the jurisdiction of the Tribunal.

3. The crimes specified in paragraph 1 shall fall within the jurisdiction of the Tribunal if they were committed since 1 January 1991:

(a) In the territory of the former Yugoslavia;

(b) In places which are not under the sovereignty of any State if the perpetrator or the victim is a national of one of the States formed on the territory of the former Yugoslavia.

Article 13. Individuals subject to the jurisdiction of the Tribunal

Individuals accused of the crimes specified in article 12 of this Statute shall be subject to the jurisdiction of the Tribunal, irrespective of their nationality.

Article 14. Principles of criminal responsibility

1. The crimes specified in article 12 of this Statute shall be deemed to have been committed by any individual who:

(a) Committed such a crime directly; and/or

(b) Organized or directed the commission of such a crime; and/or

(c) Attempted to commit such a crime or was associated in some way with the commission of such a crime, or incited others to commit such a crime, or deliberately assisted others in the commission of such a crime.

2. An individual who, of his own accord and prior to any proceedings, has refused to carry out to its conclusion any crime specified in article 12 of this Statute shall be subject to the jurisdiction of the Tribunal only if the act actually committed by him constitutes another crime under article 12 of this Statute.

3. The official position of an individual who commits a crime specified in article 12 of this Statute and, in particular, his position as head of State or the responsible official of any Government department shall not be regarded as grounds for relieving him of responsibility or mitigating the penalty.

4. The fact that an individual who has committed a crime specified in article 12 of this Statute acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if the Tribunal deems that, in the circumstances which existed at the time the crime was committed, it was possible for him not to comply with that order.

[Article 15. Non-applicability of statutory limitations

No statutory limitations shall apply to the crimes specified in article 12 of this Statute.]

Article 16. Non bis in idem

1. No one shall be tried or punished for a crime under this Statute for which he has already been convicted or acquitted by the Tribunal.

2. Subject to the provisions of paragraph 3, no one shall be tried or punished by the Tribunal for a crime under this Statute in respect of an act for which he has already been convicted or acquitted by a national court, provided that, if a penalty was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by the Tribunal for a crime under this Statute if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes specified in this Statute.

4. In handing down its judgement, the Court shall take into account any penalty imposed and enforced under a judgement previously handed down in respect of the commission of the same act.

Article 17. Judicial guarantees

An individual charged with a crime under this Statute shall be entitled without discrimination to the guarantees recognized under the generally accepted rules of international law and the general principles of law. In particular, he shall be presumed innocent until proved guilty and, inter alia, have the rights:

(a) To a fair and public hearing;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To have legal assistance of his own choosing during the preliminary examination;

(e) To be tried without undue delay;

(f) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing;

(g) To be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him and, without payment by him in any such case if he does not have sufficient means to pay for it;

(h) To examine, or have examined, the witnesses against him and obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(i) To have the free assistance of an interpreter if he cannot understand or speak the language used during the preliminary examination or the hearing;

(j) Not to be compelled to testify against himself or to confess guilt.

Article 18. Organization of the work of the Bureau

1. The Bureau shall carry out an investigation upon the receipt of the relevant information concerning acts which may be categorized as crimes under this Statute.

2. The Special Rapporteur appointed pursuant to resolution 1992/S-1/1 of 14 August 1992 of the United Nations Commission on Human Rights and the impartial Commission of Experts established pursuant to Security Council resolution 780 (1992) of 6 October 1992 shall provide the Bureau with the information referred to in paragraph 1.

The information referred to in paragraph 1 may be provided to the Bureau by the Fact-Finding Commission established pursuant to article 90 of Protocol 1 of 1977 Additional to the Geneva Conventions on the protection of war victims of 1949 and also by non-governmental humanitarian organizations.

3. The Bureau may ex officio collect the information referred to in paragraph 1.

4. A decision to carry out an investigation shall be taken by a majority of the members of the Bureau. In the event of an equality of votes, the Chief Prosecutor shall have a casting vote.

5. In the event that a decision to carry out an investigation is not taken, the organization which provided the information referred to in paragraph 1 shall be notified. That organization may present its comments in that connection to the Bureau.

6. The competence of the Bureau to carry out an investigation, the procedure for carrying out an investigation and the rights of the individual under investigation shall be defined in the Rules of the Tribunal in accordance with the generally recognized rules of international law, the general principles of law recognized by the world community and this Statute.

The Bureau, in particular, shall have the right to call and examine witnesses, to ask for and receive evidence, to call experts and to receive their findings.

Article 19. Referral to the Court of First Instance

1. Upon conclusion of its investigation, the Bureau shall take a decision, stating the reasons on which it is based:

(a) To close the case; or

(b) To refer the case to the court of the State in whose territory the acts characterized by the Bureau as crimes, were committed or in which the individual who committed those acts or the victim of those acts is resident, if those acts, albeit characterized by the Bureau as crimes, cannot, in the Bureau's opinion, be characterized as crimes defined in this Statute; or

(c) To refer the case to the Court of First Instance.

2. In the cases referred to in paragraph 1 (c), an indictment shall be drawn up and referred to the Court of First Instance.

The indictment shall contain, in particular, an indication of the place and time of commission of the acts characterized by the Bureau as a crime under this Statute; a description of these acts, the means by which they were committed and their motives and consequences; evidence attesting to the commission of a crime and to the guilt of the defendant; arguments adduced by the defendant in his defence and the results of the verification of those arguments; the exact wording of the charge and an indication of the points of law on which it is based; and, where necessary, other elements.

Article 20. Proceedings in the Court of First Instance

1. The proceedings shall be conducted in accordance with the Rules of the Tribunal.

2. The proceedings shall be conducted in public in one of the chambers of the Court of First Instance, unless the chamber decides to conduct the proceedings in camera in the interests of law and order or for considerations related to the privacy or safety of the victim, the defendant or the witness, or where the special circumstances of the case are such that public proceedings might prejudice the interests of justice.

3. Without prejudice to the rights of the defendant established by article 17, paragraph (f), of this Statute, the case may be considered in his absence.

Article 21. Judgements of the Court of First Instance

1. Judgements of the Court of First Instance shall be adopted by a majority of the votes of the judges constituting the chamber and shall be delivered in public.

2. Judgements of the Court of First Instance shall be drawn up in accordance with the Rules of the Tribunal. [Dissenting opinions by the judges shall be annexed to the judgement.]

3. A judgement of the Court of First Instance shall enter into force, shall be considered final and shall be enforceable upon the expiry of the appeal period established by article 23 of this Statute, if no appeal has been lodged against it during that period.

Article 22. Penalties

1. Subject to the provisions of paragraph 3, for the crimes in article 12 of this Statute, the Court shall designate the penalties established under the legislation of the State in which the crime was committed which was in force at the time the crime was committed.

2. If a crime has been committed in a place which is not under the sovereignty of any State, the Court shall designate a penalty provided for under the legislation of the State of which the perpetrator is a national or the State of which the victim is a national, which was in force at the time the crime was committed.

3. Sentence of death shall not be imposed. When determining the penalty, the Court shall take into account any extenuating or aggravating circumstances.

Article 23. Appeal

1. An appeal against a judgement of the Court of First Instance may be lodged with the Appellate Court within a period of 30 days from the date on which a copy of the judgement is handed to the convicted person.

2. An appeal may be lodged by the convicted person or, at his request, by his counsel, or by the prosecutor in the given case, or by the Chief Prosecutor. An appeal may be concerned only with points of law.

Article 24. Proceedings in the Appellate Court

Proceedings in the Appellate Court shall be conducted in accordance with the provisions of article 20 of this Statute, mutatis mutandis.

Article 25. Decision of the Appellate Court

1. The provisions of article 21, paragraphs 1 and 2, of this Statute shall apply, mutatis mutandis, to decisions of the Appellate Court.

2. A decision of the Appellate Court shall be final and enforceable.

Article 26. Review of the judgement

1. A judgement which has entered into force may be contested in the Appellate Court by the Bureau or by the convicted person, if, after the judgement is rendered, one or more circumstances come to light which could have a decisive influence on the judgement.

2. An appeal against a judgement shall be considered by a chamber of the Appellate Court. Judges who participated in the consideration of the case in question may not form part of this chamber.

3. If a chamber of the Appellate Court determines that there are grounds to conduct proceedings with a view to revising the judgement, it may adopt a decision:

(a) To grant a stay of execution;

(b) To take the case under its own consideration and to set aside the finding of guilt;

(c) To refer the case to the Court of First Instance for a new hearing.

Article 27. Execution of judgements

1. At the discretion of the Court and subject to the provisions of paragraph 3, a judgement shall be executed in the State in whose territory the crime was committed, or in the State of which the perpetrator is a national.

2. Execution of the judgement shall be effected in accordance with the legislation of the State in which the judgement is to be executed just as if it had been rendered by a court of that State, regardless of the fact that the acts in respect of which the judgement has been rendered may not be considered crimes under the legislation of that State or that, if they are considered crimes, different penalties are prescribed for them than that prescribed in the judgement.

3. If, having rendered a judgement, the Court should consider that due execution of the judgement cannot be ensured in the State designated in paragraph 1, it may decide that the judgement shall be executed in one of the States which have expressed their willingness to accept convicted persons.

4. The execution of sentences shall be monitored by the Bureau in accordance with the Rules of the Tribunal.

Article 28. Pardon

The State in which the judgement is executed may approach the Committee regarding a pardon or the mitigation of a penalty. In that event, it shall address to the Committee a duly substantiated request for a pardon or the mitigation of a penalty. The Committee shall adopt a decision within 30 days from the date of receipt of such request. The pardon shall be granted or the penalty mitigated by the State in which the judgement is executed.

Article 29. Competence of the Tribunal and the obligation of States to provide assistance

1. The Judicial Branch or the Bureau may request any State to provide assistance in the exercise of its functions, including, inter alia, the conduct of appropriate judicial procedures and the production of the corresponding information.

The Judicial Branch or the Bureau may adopt a decision to take into custody an individual who is charged with or suspected of the commission of a crime specified in this Statute, if such action is necessary for the investigation or for the administration of justice.

2. Each State shall render assistance to the Tribunal in the exercise of its functions, including, inter alia, the conduct of appropriate judicial procedures and the production of the corresponding information.

Each State shall render assistance to the Tribunal by tracking down, arresting and handing over to the Tribunal an accused or suspected person.

For the purposes of handing over such persons, the Tribunal shall not be regarded as a court of a foreign State.

Article 30. Ensuring the execution of the decisions of the Tribunal

1. The Plenum of the Judicial Branch or the Bureau may determine that any decision of the Court or the Bureau, as the case may be, is not being executed by a particular State. In that case, the Plenum of the Judicial Branch or the Bureau, as the case may be, shall notify the Committee of the situation that has arisen.

2. On the basis of the notification referred to in paragraph 1, the Committee may draw the attention of the State concerned to the failure to execute the decision of the Tribunal and may insist on execution within the prescribed period.

3. If, in the view of the Committee, its request is not being complied with, it may request the Security Council to adopt measures to ensure that the Tribunal's judgement is executed.

4. Upon receipt of the Committee's request, the Security Council may adopt a decision to take such measures under the Charter of the United Nations as it deems essential to ensure execution of the Tribunal's judgement.

Article 31. Privileges and immunities

1. Judges, members of the Bureau and the Registrar shall enjoy diplomatic privileges and immunities in the exercise of their duties.

2. The staff of the Registry, the counsel of the defendants, the experts and the witnesses shall enjoy such privileges and immunities as are accorded to persons of comparable status associated with the International Court of Justice.

3. The Committee may adopt a decision to withdraw the immunity of members of the Bureau.

4. The Plenum of the Judicial Branch may adopt a decision to withdraw the immunity of the Registrar, the counsel of the defendants, the experts and the witnesses.

Article 32. Seat of the Tribunal

The seat of the Tribunal shall be established at ...

Article 33. Financial questions

Financial questions relating to the work of the Tribunal shall be governed by the Financial Regulations of the Tribunal, which shall be adopted by the Committee and approved by the Security Council of the United Nations.

Article 34. Languages

1. The official and working language of the Tribunal shall be English.

2. The Court may adopt a decision to use another language in the consideration of any case.

Article 35. Participation in the Tribunal

1. After the adoption of this Statute, States which are not founding States of the Tribunal may submit an application to participate in the Tribunal.

2. The application referred to in paragraph 1 shall be addressed to the Registry of the Tribunal.

3. The Registrar shall notify all the States specified in article 11, paragraph 1, of this Statute of the receipt of an application referred to in paragraph 1.

4. Thirty days after the date of notification referred to in paragraph 3, the State submitting the application referred to in paragraph 1 shall become a participant in the Tribunal.

Annex II

Explanatory notes on the draft Statute of the International Tribunal to hear cases relating to crimes committed in the territory of the former Yugoslavia

The Russian draft Statute of the International Tribunal to hear cases relating to crimes committed in the territory of the former Yugoslavia has been prepared by a group of lawyers under the auspices of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation. The group comprised, in addition to a number of members of the Legal Department: G. Tunkin, Corresponding Member of the Russian Academy of Sciences, President of the Russian Association of International Law, Head of the Faculty of International Law of Moscow State University; V. Vereshchetin, Professor, member of the United Nations International Law Commission, Deputy Director of the Institute of State and Law of the Russian Academy of Sciences; K. Gutsenko, Professor, Head of the Faculty of Criminal Procedure of Moscow State University; and S. Kelin, Professor, Senior Fellow of the Institute of State and Law of the Russian Academy of Sciences.

The draft is based on the possibility that a Tribunal might be established and its Statute adopted by a decision of the Security Council of the United Nations taken in accordance with Articles 24, 29, 39 and 41 of the Charter.

In this context, for the preparation of the constituent instrument of the Tribunal, it is proposed that a subsidiary organ of the Security Council should be established - a Special Committee on crimes in the former Yugoslavia - to be composed of representatives of the States members of the Security Council and the States formed on the territory of the former Yugoslavia. After the adoption of the Statute, the Committee will exercise important functions in expediting the work of the Tribunal. For this purpose, the Committee could become one of the organs of the Tribunal or could operate outside the framework of its structure, but in close liaison with it (articles 2, 7, 9, 11, 28 and 30 of the draft Statute).

With a view to promoting the universal nature of the Tribunal, the draft establishes (in article 35) a procedure whereby, once the Statute has been adopted, any State may apply to participate in the Tribunal and, accordingly, become part of the Committee, which will thus consist of the founding States and States which have availed themselves of the aforementioned procedure (article 11).

Under the draft Statute, the Tribunal will hear cases relating to military crimes, crimes against mankind, the crime of genocide and acts of torture, committed in the territory of the former Yugoslavia. The crimes in question will be those committed since 1 January 1991 (article 12), since Security Council resolution 808 (1993) refers to crimes committed since 1991. At the same time, there are grounds for considering another date, namely, 25 June 1991, since, from a legal standpoint, it was from that date that the new States of the territory of the former Socialist Federal Republic of Yugoslavia started to emerge.

In view of the importance which the situation in the territory of the former Yugoslavia has for the continent of Europe, a procedure has been established by which the candidature of judges would be submitted by the States participating in the Conference on Security and Cooperation in Europe (CSCE) (article 3). At the same time, bearing in mind that the Tribunal is to be established within the framework of the United Nations, the procedure established for the election of judges to the International Court of Justice could be used, mutatis mutandis, for the formation of the Court of First Instance. A different procedure is provided for the formation of the Appellate Court: the election of judges by the above-mentioned Committee (article 4). For the characterization of crimes, it is proposed that the Court should apply international law and - provided that it is not contrary to international law - internal law (article 12), and in the handing down and execution of penalties, the law of the State in which the crime was committed and in which the judgement is to be executed, as appropriate (articles 22 and 27).

The draft Statute establishes the generally recognized right of the defendant to be tried in his presence and, at the same time, without prejudice to this right, provides for the possibility of considering a case in the absence of the defendant (in the event, for example, of the defendant's failure to appear) (article 20).

In the draft Statute, the death sentence is not permitted (article 22).

The draft Statute is based on the obligation of all States to render every assistance to the Tribunal, including the obligation to hand over the persons concerned at its request. The provision that, for the purposes of handing over such persons, in accordance with the Statute, the Tribunal shall not be viewed as a court of a foreign State (article 29) is particularly important.

In so far as the Tribunal, in the event that it is established as a subsidiary organ of the Security Council, will be set up within the framework of Articles 39 and 41 of the Charter of the United Nations, a mechanism is proposed which involves the participation of the Security Council in ensuring the execution of the decisions of the Tribunal (article 30).

The draft Statute is provisional in nature and contains certain alternative texts in square brackets.

In the event that the Statute of the Tribunal is adopted (or confirmed) by a resolution of the Security Council, it would be advisable to provide for its entry into force within a specified period, for example, 60 days, and to invite the States which have been formed on the territory of the former Yugoslavia to convey their agreement with the statute within this period. Agreement could be explicit or tacit (no objection). If no agreement is reached, the Security Council, upon expiry of the specified period, would reconsider the situation as it then stood.